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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1609

TERRY T. TORRES,

Appellant,

—v.—

COMMONWEALTH OF PUERTO RICO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF FOR THE APPELLANT

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Opinions Below

The opinion of the Supreme Court of Puerto Rico was originally rendered in the Spanish language. It is reported in Spanish at 112 Colegio de Abogados 77. A true copy of the official English translation by the Supreme Court of Puerto Rico is reproduced as Appendix A to the Jurisdictional Statement at pages 1-98. The English translation of the Judgment of the Supreme Court of Puerto Rico affirming appellant's conviction is reproduced as Appendix B to the Jurisdictional Statement at pages 99-100.

The opinion of the Superior Court of the Commonwealth of Puerto Rico, San Juan Part, was originally rendered in the Spanish language and is unreported. An

official English translation of that opinion was prepared by the Supreme Court of Puerto Rico and is reproduced as Appendix C to the Jurisdictional Statement at pages 101-17.

Jurisdiction

In the criminal trial below, appellant challenged the validity of Public Law No. 22, 25 L.P.R.A. §§ 1051-1054, a statute of the Commonwealth of Puerto Rico, on the grounds that it is repugnant to the Constitution and laws of the United States. On December 14, 1977, the Supreme Court of Puerto Rico affirmed appellant's conviction and sustained the validity of that law. The notice of appeal was filed on December 21, 1977. An amended notice of appeal was filed on January 11, 1978. On March 1, 1978, Mr. Justice William J. Brennan, Jr. issued his Order extending to and including May 13, 1978, the time to file a jurisdictional statement and/or to petition for certiorari. The Jurisdictional Statement was filed on May 12, 1978. Probable jurisdiction was noted on October 2, 1978. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1258(2) and (3). *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42, n. 1 (1970) (*dicta*), sustains this Court's appellate jurisdiction.

Constitutional and Statutory Provisions Involved

The validity of Public Law 22 of August 6, 1975, 25 L.P.R.A. §§ 1051-1054 and of Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico are challenged herein. The operative part of Public Law 22 is set forth below:

> The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.
>
> 25 L.P.R.A. § 1051 (West 1975).

Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico provides as follows:

> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law.

The other constitutional and statutory provisions involved and the full text of Public Law No. 22 are set forth in the Appendix hereto.

Questions Presented

1. Whether Puerto Rico constitutionally may enact and enforce a law that authorizes the indiscriminate, warrantless search and seizure, without probable cause, of persons and property arriving in Puerto Rico from other parts of the United States.

2. Whether Puerto Rico constitutionally may create a *"de facto"* international border between itself and other parts of the United States.

3. Whether Public Law No. 22, 25 L.P.R.A. §§ 1051-1054, unlawfully abridges the right to travel by subjecting individuals to indiscriminate, warrantless searches without probable cause upon entry into the Commonwealth of Puerto Rico from other parts of the United States.

4. Whether Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico violates the Due Process and Supremacy Clauses of the United States Constitution by precluding the Supreme Court of Puerto Rico from reversing appellant's conviction for possession of marihuana, even though a majority of the justices who heard the case were convinced that the conviction was obtained in violation of the Fourth Amendment to the United States Constitution.

Statement of the Case

On August 6, 1976, appellant arrived at Puerto Rico's Isla Verde Airport aboard Eastern Airlines' Flight 915, non-stop from Miami, and went to the baggage claim area to pick up his luggage. The trial court found that he "seemed somewhat nervous, followed with his eyes the movements of agent Ruben Marcano, who was on duty at the International Airport wearing full uniform and carrying his service revolver at that checkpoint for passengers coming from the United States." Opinion of the Honorable Charles E. Figueroa, Judge of the Superior Court (Juris. St., App. C at 103). A second agent, Marcelino Santiago

of the Division for the Search and Patrol of Ports and Airports of the Criminal Investigations Bureau of the Police of Puerto Rico, noticed that appellant seemed nervous. Agent Santiago was in plain clothes. *Id.*

As appellant was leaving the baggage area with his luggage, agents Santiago and Marcano approached appellant, identified themselves and presented a card describing their authority pursuant to Act No. 22 of August 6, 1975, 25 L.P.R.A §§ 1051-1054 [hereinafter "Public Law 22"], the operative section of which provides:

> Authorization to Inspect
>
> The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

Appellant objected to any search of his luggage and insisted on calling his uncle, an attorney in Puerto Rico. Agent Marcano told him he would be entitled to call an attorney if he had committed an offense, but made clear to him that this "was only a routine baggage search, like that of all passengers inspected pursuant to Act No. 22 of August 6, 1975." (Juris. St., App. C at 104-05.)

The officers searched appellant's luggage, and in one of the suitcases they found a pipe and a paper bag containing approximately one ounce of marihuana. (Juris. St., App. C at 105.) Appellant was arrested and charged with a viola-

tion of Article 404 of the Controlled Substances Act of Puerto Rico. On August 31, 1976, the prosecuting attorney filed an information charging that appellant "unlawfully, willfully, maliciously, knowingly and/or intentionally, carried the controlled substance marihuana. . . ." Information, August 31, 1976.[1]

Prior to trial, appellant moved to suppress the marihuana and pipe on the grounds that the evidence was obtained in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, in violation of various Puerto Rico statutory and constitutional provisions and "[i]n violation of the case law established by the Supreme Court of Puerto Rico and by the Supreme Court of the United States of America." Motion to Suppress Evidence, Superior Court No. G 76-3105 (undated). The Court heard testimony on October 26, 1976. Appellant filed a post-hearing memorandum of authorities dated November 1, 1976, arguing the unconstitutionality of Public Law 22 under federal and Puerto Rico law.

[1] The trial and all proceedings below were conducted in the Spanish language. Pursuant to appellant's request, an English translation of the record in the Supreme Court of Puerto Rico was prepared and lodged with this Court. The pages of the translation are not numbered serially and will be referred to by description of the document and by the page number within the document as translated. All relevant documents were reproduced in either the Jurisdictional Statement or the Motion to Dismiss or Affirm. Pursuant to the Clerk's memorandum regarding appendices, the parties have not reprinted the lengthy opinions below. The parts of the record reproduced in the appendices to the Jurisdictional Statement or Motion to Dismiss or Affirm are referred to by their descriptions as well as to their page number in the respective appendix. The Joint Appendix contains only docket entries and will not be referred to herein. The Appendix to this brief containing statutory material will be referred to as "Appendix" or "App."

On December 22, 1976, the Superior Court issued its Resolution and Order (Juris. St., App. C at 101-17) denying the motion to suppress evidence. The court found that appellant's luggage was searched because he appeared "nervous" as he was "about to leave the baggage claim area," and that the inspection was based on Public Law 22. The court also adopted as findings the testimony of agent Marcano as follows:

> Agent Marcano also stated that, at the Isla Verde Airport there are warnings informing arriving passengers that their luggage may be inspected under Act No. 22 of August 6, 1975, and that there are no similar warnings in the airplanes and that he thinks, although he cannot categorically assert it, that there are no warnings regarding the effectiveness and scope of Act No. 22 of August 1975 in the airports from where the airplanes depart on their domestic flights. That his intervention was partly due to the defendant's conduct and to the way he was dressed, but was rather based on the authority granted by Act No. 22 of August 1975, and that the defendant was not a suspect.
>
> (Juris. St., App. C at 105-06.)

The trial court held that:

> [D]efendant's conduct, as observed by agent Marcano, and the information received from agent Santiago, do not constitute, in our judgment, the reasonable and supported grounds required of a law enforcement officer to justify, ordinarily, the arrest of a citizen in accordance with our case law, but we can consider it suspicious conduct that could justify a

> border search, in accordance with some cases in the federal case law.
>
> (Juris. St., App. C at 108-09.)

The trial court then upheld the search on the authority of "border" searches. (Juris. St., App. C at 110-15.) The trial court noted "a serious problem with the traffic and smuggling of narcotics, firearms and explosives on the part of individuals who travel freely between Puerto Rico and the United States" (Juris. St., App. C at 112); and that no customs or other inspection facilities are set up to inspect travelers between Puerto Rico and the United States, because Puerto Rico is part of the United States. (Juris. St., App. C at 112.) The court held that the border search doctrine should apply:

> . . . because of the peculiar condition of our island, the unrestricted ease with which American citizens travel from any point in the United States to Puerto Rico, and vice versa, the frequency with which domestic flights arrive at and depart from our airport, and also because the inspection carried out under [Public Law 22] is not covered by the federal government.
>
> (Juris. St., App. C at 115.)

The trial court sitting without a jury admitted the evidence, convicted appellant, and, on January 7, 1977, sentenced him to one to three years' imprisonment. Judgment, January 7, 1977.

Appellant's motion for bail pending appeal was granted. On appeal, appellant raised the Fourth Amendment issue and further asserted that Public Law 22 violated his

federal constitutional right to travel. (Appellant's Brief to the Puerto Rico Supreme Court at 7-8.)

On December 14, 1977, the Supreme Court of Puerto Rico issued its Judgment (Juris. St., App. B) and four separate opinions (Juris. St., App. A). Although a majority of the Justices who heard the case believed Public Law 22 to be unconstitutional (Juris. St., App. B) the judgment below was affirmed on the basis of Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico which provides:

> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices *of which the Court is composed* in accordance with this Constitution or with law. [Emphasis added.]

The Supreme Court of Puerto Rico is now composed of eight members. Mr. Justice Rigau did not participate in the decision and no reason was given for his failure to do so. (Juris. St., App. B.) Because only four of the seven justices voted to declare the statute unconstitutional, appellant's conviction was affirmed.

Although the majority was powerless to declare Public Law 22 unconstitutional, it did provide an authoritative construction of the statute. Writing for the majority, Mr. Justice Irizarry first noted that the law authorized "indiscriminate" searches. (Juris. St., App. A at 3.) He went on to determine that consistent with the stated "motives" of Public Law 22, the law was "directed at seeking 'firearms, explosives, narcotic substances, depressants or

stimulants or similar substances' . . . *with the purpose of instituting criminal prosecutions.* . . ." (Juris. St., App. A at 13; emphasis added.)

The majority rejected the lower court's interpretation that the statute was directed solely towards "objects" or luggage.

> The searches authorized by said statute do not have the exclusive purpose of seizing objects. The facts of this case demonstrate this. Appellant was stopped, accused, tried and convicted as a result of the search of his luggage conducted pursuant to said act. *The police power of the state is not synonymous to the power of the police to stop persons and search them without reasonable grounds. The latter is what Act No. 22 authorizes* against the clear constitutional provisions which forbid it.
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> (Juris. St., App. A at 30; emphasis added.)

The majority also held that the particular search herein was in fact "indiscriminate" and that there is "no controversy in that the detention and the search of appellant's belongings were carried out without reasonable grounds to believe that he was acting contrary to law." (Juris. St., App. A at 3.)

The majority then rejected the border search argument as inapplicable because Public Law 22 "deals with the entry of persons and articles from the United States" and under such circumstances, "our borders are state borders." (Juris. St., App. A at 5.) Mr. Justice Irizarry noted that "[s]tates have not been authorized to stop all those who trespass its borders and search them without reasonable grounds to do so." (Juris. St., App. A at 6.)

He rejected the view that Puerto Rico's island status makes it any different from the states for Fourth Amendment purposes, since most people travel to Puerto Rico by plane, and it is "irrelevant whether the surface flown over is land or sea. . . . When traveling by plane, there is no difference between going from here to Miami or from Miama [sic] to New York." (Juris. St., App. A at 21.)

The majority also rejected the argument that the compact between the United States and Puerto Rico gives it the right to "consider the United States as a foreign country. . . ."

> The special relationship between Puerto Rico and the United States, based on the existence of a compact —Public Law 600, 81st Cong., 1 L.P.R.A., Vol. 1, pp. 136-138—does not empower us to consider the United States as a foreign country and to subject all persons arriving at Puerto Rico from the United States to an indiscriminate search of their persons and their belongings, without a search warrant and without probable cause or reasonable grounds. The Commonwealth is not an associated republic. Far from that, it is a political condition adopted by us in Puerto Rico based on, among other fundamental principles, our union with the United States. . . .
>
> (Juris. St., App. A at 19-20.)

Three additional opinions were filed by Justices who concurred with the affirmance of the judgment, but who believed Public Law 22 to be constitutional.

Mr. Justice Diaz concluded that Public Law 22 is constitutional under the "border search" doctrine. (Juris. St., App. A at 39-50.) Mr. Justice Diaz argued that Puerto Rico is a "unique entity" (Juris. St., App. A at 44), which

is more vulnerable than the states to illegal smugglers. He would, therefore, create a *"de facto* border for 'domestic' travelers which requires as much surveillance as United States international borders." (Juris. St., App. A at 45.)

Finally, he argued that the majority should not lock itself in the "conceptual prison of *stare decisis*." (Juris. St., App. A at 55.)

Mr. Justice Martin also favored a "community standards" approach to the Fourth Amendment. (Juris. St., App. A at 63-67.) In his view "the protection against unreasonable searches should be safeguarded but not when it affects the community." (Juris. St., App. A at 63.)

Notwithstanding the fact that appellant was already off the aircraft, Mr. Justice Negron concluded that the search should be upheld as an "airport search." (Juris. St., App. A at 73-75.) He also argued that the search was valid as an administrative inspection. (Juris. St., App. A at 75-85.) Finally, he would grant to Puerto Rico "prerogative and powers that the federal constitution denies to the states of the Union." (Juris. St., App. A at 85.) Citing the special tax arrangement granted Puerto Rico, he argued that Puerto Rico is to be distinguished from the states because the states "cannot escape the application of federal laws because they are part of the supreme law of the nation." (Juris. St., App. A at 86.) This distinction, he argued, gives Puerto Rico "a power that is analogous to that of federal customs agents at the nation's borders." (Juris. St., App. A at 87.)

On December 21, 1977, appellant filed a timely Notice of Appeal (Juris. St., App. D at 119-20) and a request for a stay of mandate pending appeal to this Court. The

stay was granted on January 4, 1978.[2] On January 11, 1978, appellant filed an Amended Notice of Appeal in conformance with Rule 10 of the Rules of this Court. (Juris. St., App. E at 121-23.) Both notices of appeal raised the Fourth Amendment issues. They further argued that it was a denial of due process to uphold appellant's conviction against Fourth Amendment attack when a majority of the members of the Supreme Court of Puerto Rico who heard the case believed Public Law 22 to be unconstitutional.

In his Notice of Appeal and in a separate request dated January 12, 1978, appellant asked that the record before the Puerto Rico Supreme Court be translated and sent to this Court. On March 1, 1978, Mr. Justice William J. Brennan, Jr. extended the time to file the jurisdictional statement to and including May 13, 1978, because the record had not yet been translated. On April 5, 1978, the Clerk of the Supreme Court of Puerto Rico forwarded a copy of the translated record to counsel.

On April 14, 1978, appellant filed a motion for reconsideration in the Supreme Court of Puerto Rico. The motion alleged that an opera star had recently been searched pursuant to Public Law 22, that the search had generated much publicity and that a newspaper reported that Mr. Justice Rigau had stated that he is now prepared to vote on the constitutionality of Public Law 22. The motion asked that the Court allow Mr. Justice Rigau to vote and that it reconsider its interpretation of Article V § 4 of the Puerto Rico Constitution. On May 4, 1978, the

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[2] The translation of the Resolution dated January 4, 1978, incorrectly omitted the Court's order by translating the words "it is so granted" as "the Court provides as follows." Since the parties do not contest his status, appellant has not asked for a correction.

motion was denied. The motion is printed at Appendix A of the Motion to Dismiss or Affirm, at pages 1a-5a. The order denying the motion is printed at Appendix B of the Motion to Dismiss or Affirm at pages 6a-7a.

The Jurisdictional Statement was filed on May 12, 1978. Probable jurisdiction was noted on October 2, 1978.

Summary of Argument

The Fourth Amendment applies to actions by officers of Puerto Rico. The government and the courts below assumed that it applies, and both the Supreme Court of Puerto Rico, and the First Circuit have previously so held. *United States* v. *Villarin Gerena,* 553 F.2d 723, 724 (1st Cir. 1977); *People of Puerto Rico* v. *Caballero,* 100 P.R.R. 146 (1971). The Fourth Amendment applies to Puerto Rico on any one of four rationales:

1. It applies directly under *Reid* v. *Covert,* 354 U.S. 1 (1957), which held that all the Bill of Rights apply to territories and possessions of the United States, with the possible exception of places where the application would "disrupt long-established practices and be inexpedient." 354 U.S. at 13. Since the days of Spanish rule Puerto Rico has had a prohibition on unreasonable searches and seizures in one form or another. The Commonwealth compact contains an explicit prohibition on unreasonable searches and seizures as well as an exclusionary rule. Thus, one cannot say that application of the Fourth Amendment would disrupt long-established practices. Indeed, *not* to apply it would be inexpedient and disruptive.

2. Even if the Fourth Amendment does not apply to the Commonwealth directly under the *Reid* v. *Covert* rationale, it applies by virtue of the Compact between the United States and the people of Puerto Rico. The compact explicitly granted the protections of the federal Bill of Rights to residents of Puerto Rico. *Examining Board* v. *Flores de Otero,* 426 U.S. 572, 594 n. 25 (1976). In entering the compact, Congress exercised its power under the Territorial Clause, Art. IV, § 3, cl. 2 to mandate that the Bill of Rights be extended in full force and effect to Puerto Rico in the same manner as to the states.

3. If the Court holds that as a constitutional matter Congress had no authority under the Territorial Clause to extend the Bill of Rights to Puerto Rico, nonetheless the Bill of Rights should apply in order to honor the contract between the people of Puerto Rico and the United States Congress. In entering into the compact with Congress, the people of Puerto Rico bargained for and got the protections of the Bill of Rights. Applying Fourth Amendment protections as a non-constitutional matter would have the same practical effect as applying those protections constitutionally.

4. Finally, the "rights, privileges and immunities" granted to citizens of Puerto Rico under the compact and under an explicit provision of the Federal Relations Act (61 Stat. 772, 48 U.S.C. § 737), may and should be expanded to include protections from unreasonable searches and seizures.

Public Law 22 authorizes blanket, warrantless searches of persons, luggage and effects arriving in Puerto Rico from the United States mainland. The searches are both indiscriminate, in that they apply to everyone and everything, and utterly discretionary, in that they require

neither probable cause nor any cause at all. As such, they clearly contravene the Fourth Amendment prohibition against unreasonable searches and seizures. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 273 (1973); *United States* v. *Chadwick,* 433 U.S. 1, 15 (1977).

The government and the prevailing minority below sought to justify Public Law 22 under the border search doctrine. They argue that because Puerto Rico has been subjected to increased traffic in illegal guns and drugs, it should be allowed to create an "intermediate" border between itself and the mainland United States. Such an argument ignores the clear intent of both Congress and Puerto Rico in setting up the Commonwealth. Puerto Rico is indisputably a part of the United States. It is included within the boundaries of the United States and is part of our customs territory. Congress has no more given Puerto Rico the right to search passengers arriving from the mainland than it has authorized New York to search those coming from New Jersey. Puerto Rico may not rely on an increase in illegal traffic—a problem it shares with nearly every region of the country—in order to justify a statute which violates the Fourth Amendment. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 273 (1973).

The challenged searches are neither made at the functional equivalent of a border nor otherwise exempt from warrant and probable cause requirements. The "fixed checkpoint" stops upheld by this Court in a wholly different context involved only brief detentions which did not include authority to search. "[C]heckpoint searches are reasonable only if justified by consent or probable cause to search." *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 567 (1967).

Public Law 22 violates not only the Fourth Amendment; it violates the constitutional right to travel as well. That right "has been firmly established and repeatedly recognized." *United States* v. *Guest,* 383 U.S. 745, 757 (1966).

This Court has recently assumed that the right to travel freely between Puerto Rico and any of the several states is "virtually unqualified." *Califano* v. *Torres,* —— U.S. ——, 55 L.Ed. 2d 65, 69 n. 6 (1978). The imposition of any penalty on the constitutional right to travel must be justified by a compelling state interest. *Dunn* v. *Blumstein,* 405 U.S. 330, 340 (1972). The interest which Puerto Rico asserts here is shared by nearly every state and major city in the nation. To allow it to be asserted in such a way would effectively eliminate the right to travel freely within the United States.

Despite a clear recognition of the constitutional infirmity of Public Law 22, the majority of the court which heard appellant's case was barred from overturning his conviction. This anomalous outcome resulted from the application of Article V, § 4 of the Puerto Rican Constitution. That section requires a majority of the eight-member Supreme Court to agree before a statute may be declared unconstitutional. Because only seven Justices sat to hear the appeal, the majority of four which voted to overturn the conviction was insufficient under Article V, § 4. Thus, the votes of five Justices are necessary to vindicate a federal right but the votes of only three are sufficient to extinguish it. Under the circumstances of this case, the application of Article V, § 4 subordinated federal rights to local law in violation of the Due Process and Supremacy Clauses of the United States Constitution.

ARGUMENT

I.

Public Law 22 has been interpreted to authorize indiscriminate, warrantless searches without probable cause.

Section 1 of Public Law 22, 25 L.P.R.A. § 1051, has three clauses:

First, the Police of Puerto Rico are:

> [E]mpowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States. . . .

Second, the Police are also empowered and authorized to:

> [E]xamine cargo brought into the country. . . .

Finally, they are authorized to:

> [D]etain, question, and search those persons whom the police have grounds to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

Public Law 22, August 6, 1975, 25 L.P.R.A. § 1051 (West, 1975, 658-59).[3]

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[3] Section 2 of the Act requires that "advertisements" of the foregoing provisions be "placed in a visible place on piers and airports by the Police of Puerto Rico for all landing passengers." 25 L.P.R.A. § 1052. Section 3 requires that Police acting pursuant to the Act be in uniform, show credentials and conduct the search "in a respectful way, and as brief as possible." Appellant does not contest that the search was conducted in a respectful way. Its brevity or lack thereof is not in issue. Section 3 also provides that "[m]anual search of persons shall be carried out by individuals of the same sex as the person involved, and in appropriate places guaranteeing the greatest privacy." 25 L.P.R.A. § 1953. The record similarly does not reflect compliance or lack thereof with this section, and it is not in issue.

The meaning of the first section appears to be clear. It is authorization—although not an express command—for the police to inspect all the luggage, packages, bundles and bags of persons arriving in Puerto Rico from the mainland.[4] The Act provides no standards for initiating inspections. Under the language of the Act, baggage inspections may be conducted for any reason or for no reason at all.

The second clause of Section 1 is similarly sweeping. It gives the Police power to examine any cargo brought into the "country." It is also far less precise than the first clause. "Country" may mean Puerto Rico or the United States. In any event, the second clause broadens the unrestricted search authority to include all goods, whether accompanied by private individuals or shipped separately.

On its face, the third clause would appear to authorize the stop and search of any person, any time, anywhere, whom "the Police have ground to suspect" of illegally carrying firearms, narcotics and the like. There is no geographical limit, and, as in the first two clauses, neither

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[4] The use of the phrase "from the United States" implies that Puerto Rico is not in the United States. The general language in the Statement of Motives to the Act and the incontestable status of Puerto Rico as being part of the United States suggests that the Legislature meant "mainland" United States. It was so assumed below. *See*, Statement of Motives to Public Law 22, 25 L.P.R.A. §§ 1051-1054 (West 1975), App. at 4a-5a. *See, e.g.*, Opinion of Mr. Justice Irizarry (Juris. St., App. A at 21); Opinion of Mr. Justice Negron Garcia (Juris. St., App. A at 71).

a warrant nor probable cause is required. The Supreme Court of Puerto Rico, however, has put a limiting interpretation on the final clause by assuming that it, like the other clauses, applies only to persons arriving from the United States mainland. (Juris. St., App. A at 22.) The majority expressly interprets the statute as not requiring "reasonable ground to suspect" before the Police may search bundles and bags. Thus, in order to conduct a luggage search, the Police may stop a person for any reason or none at all.[5] The majority also held that the searches are conducted "with the purpose of instituting criminal prosecutions. . . ." (Juris. St., App. A at 13.) Mr. Justice Diaz appears to differ from the majority only in his belief that the Act does require reasonable grounds to search an individual, but not for search of his or her luggage. Mr. Justice Martin also would read the statute to require "reasonable grounds" for search of the person, but no reason at all for search of luggage or cargo. (Juris. St., App. A at 60.) Although Mr. Justice Negron's position on this issue is somewhat less clear, he too appears to be of the view that the search of a person—but not the person's luggage—requires "reasonable grounds."[6] (Juris. St., App. A at 70-71, n. 1.)

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[5] "The second half of section 1 of Act No. 22 (1975) provides that 'in order to detain, question, and search persons' arriving from the United States, the Police must have grounds 'to suspect [they illegally carry] firearms, explosives, depressants or stimulants or similar substances.' Nevertheless, the first half of said section 1 empowers and authorizes the Police of Puerto Rico 'to inspect the luggage, packages, bundles, and bags' of said persons without requiring reasonable grounds. In other words, it authorizes the Police to search the baggage, packages, bundles and bags of passengers indiscriminately."

Majority opinion of Mr. Justice Irizarry (Juris. St., App. A at 22) (brackets in the original).

[6] The statute speaks only of "ground to suspect" (*motivos fundados*) and not probable cause (*causa probable*).

The differing interpretations of the majority and minority may be summarized as follows: The majority believes the statute to authorize the Police to search—for any reason or no reason at all—the person, luggage, packages, bundles, and bags of anyone entering Puerto Rico from the United States mainland, as well as any cargo he or she may send separately. The minority believes the statute to authorize the police to search luggage, packages, bundles, bags and cargo for any reason or no reason at all, but believes that it requires "reasonable grounds" for the search of the particular person.

In the present circumstances involving a search of appellant's luggage without reasonable grounds, both the minority and the majority recognize that the statute purports to authorize a warrantless search, solely at the officer's discretion, with neither probable cause nor any lesser reasonable suspicion as a predicate for the search. Since, as we demonstrate below, such a statute is far beyond the constitutional pale under either interpretation, the distinction is of no major importance. This Court is bound by the Puerto Rico Supreme Court's interpretation of the meaning of the statute since the interpretation is fully consistent with the statute and certainly not "inescapably wrong." *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 43 (1970) (*per curiam*).[7]

Under Public Law 22 Agent Marcano had complete discretion to search appellant's luggage if he so chose.

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[7] The "inescapably wrong" language cited in *Fornaris* was taken from Mr. Justice Douglas' opinion in *Bonet* v. *Texas*, 308 U.S. 463, 471 (1940). *Bonet*, of course, was decided before the creation of the Commonwealth. If, as we suggest below, Puerto Rico is to be treated as a state for purposes of the application of Fourth Amendment protections, it may be that the standard of deference should be even higher. A state court's interpretation of a local statute is final and not subject to review even if "inescapably wrong." *See, Murdock* v. *City of Memphis*, 20 Wall. 590 (1875).

The government and each of the judges below agree that appellant was stopped without "reasonable grounds" to believe he was violating the law.[8] Opinion of Mr. Justice Irizarry (Juris. St., App. A at 22-23); Opinion of Mr. Justice Diaz (Juris. St., App. A at 31); Opinion of Mr. Justice Negron Garcia (Juris. St., App. A at 87); Opinion of Mr. Justice Martin (Juris. St., App. A at 60).

Similarly, there is no dispute as to what prompted the stop. The trial judge found that appellant "seemed somewhat nervous, followed with his eyes the movements of [the] agent." (Juris. St., App. C at 103.) The judge also adopted the agent's testimony that he intervened "partly due to the defendant's [nervous] conduct and to the way he was dressed, but was rather based on the authority granted by Act No. 22 of August 1975, and that the defendant was not a suspect." *Id.* at 106. This is a long way of saying that the agent had no real reason for stopping appellant.

Finally, it is undisputed that a warrant was neither sought nor issued.

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[8] In determining whether there was probable cause to search, this Court is not bound by conclusions of lower courts that a set of facts constitutes probable cause. *Ker* v. *California*, 374 U.S. 23, 34 (1963). Nor, we suppose, is it bound by concessions below. *See, Swift & Company* v. *Hocking Valley Railway Company*, 243 U.S. 282, 289 (1917). Here, however, there can be no question that the majority's characterization of the search as "indiscriminate" and "without reasonable grounds" is accurate. *See,* Juris. St., App. A at 22-23.

II.

The Fourth Amendment to the United States Constitution applies to actions of Police of the Commonwealth of Puerto Rico.

Both the government and the courts below have assumed that the Fourth Amendment applies to actions of officers of the Commonwealth of Puerto Rico.[9] The First Circuit has also concluded that the Fourth Amendment applies. *United States* v. *Villarin Gerena*, 553 F.2d 723, 724 (1st Cir. 1977).[10] They are all, of course, entirely correct. Because the applicability of the Fourth Amendment is intimately related to the status of Puerto Rico and thereby to the heart of the government's argument, however, we review here the development of Fourth Amendment principles in Puerto Rico.

Mr. Justice Blackmun recently discussed the applicability of the Bill of Rights to Puerto Rico in *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 586-94 (1976). His discussion reflected a longstanding concern over Congressional intent with respect to the island. Thus, the *Otero* Court concluded that the Foraker Act, 31 Stat. 77, April 12, 1900, the first comprehensive legislation concerning Puerto Rico,

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[9] *See, e.g.*, Report of the Solicitor General to the Puerto Rican Supreme Court at 6 ("The Fourth Amendment to the Constitution of the United States and Article II, Section 10 of the Constitution of the Commonwealth of Puerto Rico provide that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."); *see, also,* Opinion of Mr. Justice Irizarry for the majority, Juris. St., App. A at 3.

[10] "Like the Supreme Court, we have no need to decide whether the Fourth Amendment's protection against unreasonable arrest and the Fifth Amendment due process clause apply directly or are funneled through the Fourteenth Amendment." 553 F.2d at 724.

indicated Congressional uncertainty over the extent to which the Constitution applied. The Court also noted an apparent desire on the part of Congress to leave "the question of the personal rights to be accorded to the inhabitants of Puerto Rico to orderly development by this Court and to whatever further provision Congress itself might make for them." 426 U.S. at 590.

In the Organic Act of 1917, 39 Stat. 951 (the Jones Act), Congress codified a bill of rights which provided Puerto Ricans with "nearly all the personal guarantees found in the United States Constitution." 426 U.S. at 591,[11] including protection against unreasonable searches and seizures. The first provision of the bill of rights in the Jones Act was essentially similar to that in the first clause of the Fourteenth Amendment. This Court therefore concluded in *Otero* that Congress must have chosen that language "with the Fourteenth Amendment in mind and with a view to further development by this Court of the doctrines embodied in it." 426 U.S. at 591-92.

In Public Law 600, the Act of July 3, 1950, 64 Stat. 319, Congress took the first step toward creating the Commonwealth of Puerto Rico. The Act authorized Puerto Rico to draft a constitution which was to "provide a republican form of government" and "include a bill of rights." 48 U.S.C. § 731c, 64 Stat. 319. That constitution was approved by Congress with the proviso that any amendment or revision must be consistent with "the applicable provisions of the Constitution of the United States." 66 Stat. 327, 48 U.S.C. § 731d. The Senate report approving the constitution explained that the purpose of this condition was that "[a]pplicable provisions of the United States Constitution and the Federal Relations Act [64 Stat. 319] will have the

[11] At the same time, Congress granted Puerto Rican citizens United States citizenship. Jones Act § 5, 39 Stat. 953.

same effect as the Constitution of the United States has with respect to State constitutions or State laws"; and went on to state:

> Any act of the Puerto Rican Legislature in conflict with . . . the Constitution of the United States or United States laws not locally inapplicable would be null and void.
>
> Within this framework, the people of Puerto Rico will exercise self-government. As regards local matters, the sphere of action and the methods of government bear a resemblance to that of any State of the Union.

S. Rep. No. 1720, *Approving the Constitution of the Commonwealth of Puerto Rico,* 82d Cong., 2d Sess. at 6 (1952). *See, Examining Board* v. *Flores de Otero,* 426 U.S. 572, 593 n. 25 (1976).

Congress' view that local acts "in conflict with . . . the Constitution . . . would be null and void" was shared by the people of Puerto Rico. The Resident Commissioner, Puerto Rico's elected representative to Congress, testified:

> Under S. 3336, the local governmental structure of Puerto Rico would be predicated on the democratic principle; not only would the people be authorized, as it is now, to adopt its local laws, but also on the local law of laws, the local constitution; while its station within the United States Federal system, as heretofore determined by Congress, would remain unimpaired. The local constitution would, of course, be comparable with a State constitution.[12]

[12] Statement of Dr. Antonio Fernos-Isern, Resident Commissioner of Puerto Rico, United States Senate Hearing before the Subcommittee of the Committee on Interior and Insular Affairs, May 17,

The Governor of Puerto Rico put it succinctly:

> Naturally, the Constitution of Puerto Rico, like those of the States, cannot diminish any rights guaranteed by the Federal Constitution in its application to Puerto Rico.[12]

In our view, the Fourth Amendment applies to and limits actions of the police of Puerto Rico on one of four alternative theories. Regardless of the rationale by which the protections of the Fourth Amendment are applied to Puerto Rico, the practical effect is the same. Evidence unlawfully obtained must be suppressed. *Compare Weeks* v. *United States*, 232 U.S. 383 (1914); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) *with* Constitution of the Commonwealth of Puerto Rico, Article II, § 10, cl. 4.

1. *The Fourth Amendment applies directly to Puerto Rico.*

Regardless of Congressional intent, the decisions of this Court make it apparent that the Bill of Rights—and certainly the Fourth Amendment—applies to the Commonwealth of Puerto Rico.

It was not always so. Beginning with *Ross* v. *McIntyre*, 140 U.S. 453 (1891) and continuing with the so-called "Insular Cases,"[13] this Court first limited the extent to which

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1950 at 3. *See, also*, Statement of Hon. Cecil Snyder, Associate Justice of the Supreme Court of Puerto Rico, *id.* at 23, 24; Statement of Hon. Luis Munoz-Marin, Governor of Puerto Rico, House of Representatives Hearings before the Committee on Public Lands, July 12, 1949, at 4 and 26.

[12] Statement of Hon. Luis Munoz-Marin, Governor of Puerto Rico, United States Senate Hearings Approving the Puerto Rican Constitution before the Committee on Interior and Insular Affairs, April 29, 1952, at 15.

[13] *See, Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903); *Dorr* v. *United States*, 195 U.S. 138 (1904). Prior to the Insular Cases, the Court had taken the position that all the restraints of the Bill of Rights applied to all territories. *See, e.g., Thompson* v. *Utah*, 170 U.S. 343, 349 (1898).

the Bill of Rights followed Americans abroad and in United States territories. In allowing the trial of an American seaman before an American consul in Japan, *Ross* held that the Constitution had no applicability abroad. 140 U.S. at 464. In the Insular Cases, the Court distinguished between so-called "incorporated" territories bound for statehood and "unincorporated" territories. Incorporated territories were subject to all the provisions of the Bill of Rights, whereas unincorporated territories were accorded only limited rights because of a fear that their different cultures and customs would be disturbed. *Balzac* v. *Porto Rico*, 258 U.S. 298, 310 (1922).

In *Reid* v. *Covert*, 354 U.S. 1 (1957), however, this Court disapproved *Ross* v. *McIntyre* and sharply limited the Insular Cases to their historical facts. 354 U.S. at 12, 14. Holding that dependents of servicemen abroad were entitled to the full protection of the Bill of Rights, the Court specifically disapproved the suggestion in *Dorr* v. *United States*, 195 U.S. 138, 144-48 (1904), that only "fundamental" constitutional rights protect Americans in the territories or abroad. It found:

> . . . no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shall nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.

Reid v. *Covert*, 354 U.S. 1, 9 (1957) (plurality opinion).[14]

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[14] Mr. Justice Black's plurality opinion was joined by the Chief Justice and by Justices Douglas and Brennan. Justices Frankfurter and Harlan concurred, but would limit the holding to capital cases. 354 U.S. 41, 64, 65, 77-78. *Covert* and its progeny —*Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960);

The teaching of these cases is twofold. First, the Bill of Rights applies with full force and effect to actions by *federal* officers anywhere in the world. Had appellant been searched by a federal officer, he would have come squarely within the holding of *Reid* v. *Covert*, 354 U.S. 1 (1957). Second, the Bill of Rights protects persons from actions of local officers within all the territories and possessions of the United States, with the possible and only exception of those territories whose cultures are so alien that application of the Bill of Rights would "disrupt long-established practices and would be inexpedient." *Reid* v. *Covert*, 354 U.S. 1, 13 (1957), *see*, *King* v. *Morton*, 520 F.2d 1140, 1147 (D.C.Cir. 1975); *King* v. *Andrus*, 452 F.Supp. 11 (D.D.C. 1977). The rationale is grounded in common sense and a decent respect for the inhabitants of the territories. If the United States is to impose its laws on the inhabitants of a territory—whether directly or through a territorial or other government approved by Congress—then, at a minimum, the residents of the territory are entitled to the protections of the Bill of Rights.

We recognize that *Reid* v. *Covert*, *supra*, involved action by federal officials. Its importance here, however, is in its repudiation of the doctrine of the Insular Cases limiting the applicability of the Bill of Rights to territories and possessions. Once it is recognized that the Bill of Rights applies to searches by federal officers in Puerto Rico,[16] no

Grisham v. *Hagen*, 361 U.S. 278 (1960); *McElroy* v. *United States ex rel. Dominic Guagliardo*, 361 U.S. 281, 288 (1960)—were the result of direct action by a United States agency abroad.

[16] The First Circuit has long recognized the applicability of the Fourth Amendment to federal officers acting in Puerto Rico. *See, e.g.*, *United States* v. *Union Nacional de Trabajadores*, 576 F.2d 388 (1st Cir. 1978); *Montilla Records of Puerto Rico, Inc.* v. *Morales*, 575 F.2d 324 (1st Cir. 1978); *United States* v. *Cruz Pagan*, 537 F.2d 554 (1st Cir. 1976); *United States* v. *Mark Polus*, 516 F.2d 1290 (1st Cir. 1975), *cert. den.* 423 U.S. 895 (1976).

basis exists for a "double standard" for local and federal officials. *Mapp* v. *Ohio*, 367 U.S. 643, 658 (1961). Indeed, such a double standard would only sink the Court back into the quicksand of the "silver platter" doctrine discarded in *Elkins* v. *United States*, 364 U.S. 206, 223 (1960), but not without leaving a legacy of needless conflict between state and federal officers. *See*, *Rea* v. *United States*, 350 U.S. 214 (1956).

During the period in which it adhered to the "fundamental right" analysis of the Insular Cases, *Dorr* v. *United States*, 195 U.S. 138 (1904), this Court held only two of the provisions of the Bill of Rights inapplicable to Puerto Rico. In *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922), the Court declined to apply the right to trial by jury and the right to indictment by grand jury. At that time, of course, neither the right to trial by jury nor the right to indictment by grand jury applied to the States. *See*, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Hurtado* v. *California*, 110 U.S. 516 (1884). In short, this Court has never denied to the residents of a territory or possession any of the Bill of Rights while holding them applicable to the States. The theory on which those rights have been held to apply has differed, but the result has been essentially the same.

There would appear to be little difference between a right which is "fundamental" (*Dorr* v. *United States*, 195 U.S. 138 (1904)) and one which is "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). *See*, *Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968). The modern standard enunciated in *Reid* v. *Covert* appears to facilitate application of constitutional rights more than either of the two earlier standards."

[17] Even if the "fundamental rights" approach of *Dorr* v. *United States*, 195 U.S. 138 (1904), were still good law, the Fourth Amendment would apply since it is a "fundamental right." *Wolf* v. *Colorado*, 338 U.S. 25, 27-28 (1949).

Under the teaching of *Covert*, *all* the provisions of the Bill of Rights apply to Puerto Rico directly unless their application would—in light of the island's history—"disrupt long-established practices and would be inexpedient." 354 U.S. 1, 13 (1957). The Fourth Amendment, however, is hardly a stranger to Puerto Rico. Indeed, the Fourth Amendment's prohibition of unreasonable searches and seizures has been a part of the culture of Puerto Rico since at least the Spanish Constitution of 1876. Article 8 of that constitution provided:

> Every warrant for imprisonment, for the search of a domicile, or for the detention of correspondence must state cause for its issuance.[18]

The Constitution Establishing Self-Government in the Island of Puerto Rico by Spain in 1897 continued the rights granted Puerto Ricans under the Spanish Constitution. The Governor-General, however, was authorized to suspend, among other provisions, Article 6 of the Spanish Constitution, which provided that no person could enter the house of a Spaniard or foreign resident in Spain without his consent.[19]

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[18] The Spanish Constitution of 1876, as well as other relevant historical documents, is reprinted in *Documents on the Constitutional History of Puerto Rico*, Office of the Commonwealth of Puerto Rico (2d ed., June 1964) (hereinafter "*Documents*"). The Spanish Constitution appears at 9-21.

[19] Article 6 of the Spanish Constitution (*Documents* at 10) provided:

> Art. 6. No person may enter the house of a Spaniard or foreigner resident in Spain without his consent, except in the cases and in the manner expressly provided in the laws.
>
> The examination of papers and effects shall always be carried on in the presence of the interested party, or of a member of his family, and in default thereof, in the presence of two neighboring witnesses from the same town.

Article 42, subparagraph 4, of the Constitution Establishing Self-Government in the Island of Puerto Rico in 1897 (*Documents* at 40) granted the Governor-General authority to suspend that provision.

The Foraker Act, the First Organic Act of Puerto Rico, March 1, 1900, 31 Stat. 77, contained no specific provision respecting property or search and seizure.[20] The Jones Act, the Organic Act of 1917, 39 Stat. 951, however, provided:

> That the right to be secure against unreasonable searches and seizures shall not be violated.
>
> That no warrant for arrest or search shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

39 Stat. 951, § 2.

The current constitution of Puerto Rico contains the most explicit protection from unreasonable search and seizure, including a constitutionally required exclusionary rule:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.
>
> Wire-tapping is prohibited.
>
> No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.
>
> Evidence obtained in violation of this section shall be inadmissible in the courts.

Article II, Section 10, of the Constitution of the Commonwealth of Puerto Rico (48 U.S.C. § 731d).

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[20] It did, however, set up a procedure for appeal to the United States Supreme Court for claimed violations of federal constitutional rights. Foraker Act § 35, 31 Stat. 85, § 35.

Whatever the history and culture of Puerto Rico may suggest with respect to the rest of the Bill of Rights, there can be no doubt that the Fourth Amendment guarantee against unreasonable search and seizure is, and long has been, fully a part of the Puerto Rican culture and tradition.[21] Indeed, it would "disrupt long-established practices" if the Fourth Amendment were not applied.

2. *The Fourth Amendment applies to Puerto Rico by operation of the Territorial Clause of the United States Constitution.*

Although appellant's position is that the Fourth Amendment applies directly to Puerto Rico under the *Covert* rationale, we recognize, as did the Court in *Examining Board* v. *Flores de Otero,* that the relationship between the United States and Puerto Rico "has no parallel in our history. . . ." 426 U.S. at 596. We realize, therefore, that the Court may decide not to apply the Bill of Rights to Puerto Rico under the *Covert* rationale. Even if the Court reaches that conclusion, however, it can and should honor Congress' intent to apply the Bill of Rights by exercising its power under the Territorial Clause. That clause provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[21] The courts below and the government have assumed its applicability. *See,* citations, *supra,* footnote 9. The Puerto Rico Supreme Court has so assumed in its prior cases, *see, e.g., People of Puerto Rico* v. *Caballero,* 100 P.R.R. 146 (1971), as has the First Circuit Court of Appeals, *see, e.g., United States* v. *Villarin Gerena,* 553 F.2d 723, 724 (1st Cir. 1977); *Amezquita* v. *Hernandez-Colon,* 518 F.2d 8 (1st Cir. 1975), *cert. den.* 424 U.S. 916 (1975).

Article IV of the Constitution of the United States, § 3, cl. 2. The powers vested in Congress by the Territorial Clause are "broad." *Examining Board* v. *Flores de Otero,* 426 U.S. 586 n. 16 (1976).

The Court has recognized the intent of Congress in the 1950 and 1952 legislation "to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union. . . ." 426 U.S. at 594. Most important, of course, is Congress' intent that "[a]ny act of the Puerto Rican Legislature in conflict with . . . the Constitution of the United States . . . would be null and void." 426 U.S. at 593 n. 25, quoting S. Rep. No. 1720 at 6.

If this Court were to give full effect to Congressional intent in the matter, then it would apply the Fourth Amendment to Puerto Rico, as it has applied it to the States. *Wolf* v. *Colorado,* 388 U.S. 25 (1949); *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

The ultimate resolution of questions respecting the applicability of the Constitution to Puerto Rico is, of course, for this Court. *Marbury* v. *Madison,* 1 Cranch 137 (1803).[22] Nevertheless, the Court has expressed considerable concern that the intent of Congress be realized. 426 U.S. at 590.

[22] Mr. Dooley put it somewhat less elegantly than Chief Justice Marshall:

> It happened a long time ago an' I don't raymimber clearly how it came up, but some fellow said that ivrywhere th' Constitution wint, th' flag was sure to go. "I don't believe wan wurrud iv it," says th' other fellow. "Ye can't make me think th' Constitution is goin' thrapezin' around ivrywhere a young liftnant in th' ar-rmy takes it into his head to stick a flag pole. It's too old. It's a home-stayin' Constitution with a blue coat with brass buttons onto it, an' it walks with a goold-headed cane. It's old an' it's feeble an' it prefers to set on th' front stoop an' amuse th' childher." . . . "But," says th' other, "if

It is not at all clear, however, that Congress at the time of the Compact had the power to decide whether and to what extent the Bill of Rights should apply to Puerto Rico. It could not, we assume, have decided that *none* of the provisions of the Bill of Rights apply to United States citizens resident in and traveling through Puerto Rico since "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n. 5 (1974), *quoting from Mora* v. *Mejias*, 206 F.2d 377, 382 (1st Cir. 1953).

It is not necessary for the Court to decide whether Congress could limit the applicability of the Bill of Rights. It is enough to recognize that the Territorial Clause is a sufficient grant of authority to Congress to permit it to expand application of the Bill of Rights beyond that which this Court might otherwise provide.

3. *The Compact between Congress and the people of Puerto Rico should be honored and the Fourth Amendment applied to Puerto Rico in the same manner as to the States.*

If this Court is of the view that its role as the final arbiter of the Constitution precludes Congressional extension of the Bill of Rights through the Territorial

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it wants to thravel, why not lave it?" "But it don't want to." "I say it does." "How'll we find out?" "We'll ask th' Supreme Court. They'll now what's good f'r it."

P. F. Dunne, *Mr. Dooley at His Best* (1938), quoted in Note, *Inventive Statesmanship vs. the Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers*, 60 Va. L. Rev. 1041, 1063 n. 112 (1974).

Clause, it should nonetheless honor the Commonwealth Compact on non-constitutional grounds.

Under either the *Covert* or the Territorial Clause rationale, the Fourth Amendment would apply as a constitutional matter. If those rationales are not accepted, the Compact should still be honored and the protections of the Fourth Amendment applied to the people of Puerto Rico as they contracted for them. *See, Mora* v. *Torres*, 113 F.Supp. 309 (D.P.R.), *aff'd*, 206 F.2d 377 (1st Cir. 1953).

The legislative history of the Compact discussed above demonstrates that the representatives of the people of Puerto Rico assumed that they were protected by the Bill of Rights. Indeed, it is inconceivable that the people of Puerto Rico would have agreed to remain subject to the authority of Congress, even if somewhat limited, without the concomitant protections of the Bill of Rights.

The strongest evidence that the Fourth Amendment applies is found in the words of the Compact itself. Both the Puerto Rican Constitution and the Federal Relations Act require public officials in Puerto Rico to take an oath to support the Constitution of the United States. Constitution of the Commonwealth of Puerto Rico, Art. VI, § 16 (48 U.S.C. § 731d); Puerto Rican Federal Relations Act, 47 Stat. 158, 48 U.S.C. § 874. This requirement is not limited to "applicable provisions," and it in no way suggests that Puerto Rican officials such as the police are sworn to uphold some, but not all, of the provisions of the Bill of Rights.

To hold that the Fourth Amendment does not apply to actions by Puerto Rico's officials would have this Court needlessly disturb the balance bargained for and achieved by the parties to the unique Commonwealth Compact.

4. *The right to be free from unreasonable searches and seizures is one of the privileges and immunities of United States citizenship.*

As specifically provided in the Compact, the Privileges and Immunities Clause of article IV, § 2, cl. 1,[23] provides an alternative ground for applying Fourth Amendment protections to Puerto Rico.

Although the Puerto Rican Constitution supersedes the Bill of Rights originally contained in the Jones Act, the last clause of that Act remains in full force and effect:

> The rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of section 2 of article IV of the Constitution of the United States.

61 Stat. 722, 48 U.S.C. § 737 (Aug. 5, 1947).

It is difficult to imagine a context in which the privileges and immunities of United States citizenship are more important than that involving Puerto Rico. The Preamble to the Puerto Rican Constitution states:

> We consider as determining factors in our life our citizenship of the United States of America and our aspiration continually to enrich our democratic heritage

[23] There are two Privileges and Immunities Clauses in the Federal Constitution. Article IV, § 2, reads as follows:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

The provision found in section 1 of the Fourteenth Amendment is more specific:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

> in the individual and collective enjoyment of its rights and privileges . . . .

The phrase "privileges and immunities," when used to refer to Puerto Rico, uniformly contains the added word "rights," suggesting that much more is involved here than the list of privileges traditionally found in Article IV, § 2.

That list has not changed substantially since it was first enunciated in *Corfield* v. *Coryell,* 6 F. Cas. 546 (No. 3230) (CCED Pa. 1825), a case this Court has described as "the first, and long the leading explication of the [Privileges and Immunities] Clause," *Austin* v. *New Hampshire,* 420 U.S. 656, 661 (1975). The list includes the following:

> the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal.
>
> 6 F. Cas. at 552.

The list was expanded in *Twining* v. *New Jersey,* 211 U.S. 78 (1908) with the addition of the right to petition Congress, to vote for national office, to enter the public lands, to be protected against violence while in the lawful custody of a United States marshal, and to inform the United States authorities of a violation of its laws. Mr. Justice Brennan, dissenting in *Baldwin* v. *Montana Fish and Game Comm'n,* —— U.S. ——, 56 L.Ed. 2d 354, 376 (1978) noted that *Doe* v. *Bolton,* 410 U.S. 179 (1973) added medical services to the rights protected by the Clause. *See generally, Hicklin* v. *Orbeck,* —— U.S. ——, 57 L.Ed. 2d 397 (1978).

In *Baldwin, supra,* this Court recently indicated that the privileges and immunities clause protects "fundamental"

interests, "interference with which would frustrate the purposes of the formation of the Union." —— U.S. ——, 56 L.Ed. 2d at 368. Surely the right to be free of indiscriminate, warrantless searches must be included within those interests.

Puerto Rico occupies a unique political status in our federal system. In compacting with the United States, the people of Puerto Rico were surely aware that they were embarking on a new and uncharted course. They clearly relied, therefore, on the fact of their United States citizenship to ensure them a steady and inviolable position within the Federation. Similarly, Congress had a strong interest in securing continuing rights to citizens of the mainland who travel or reside in Puerto Rico. These rights will be insignificant indeed if they are held not to include the right to be free of the searches sanctioned by Public Law 22.

Justice Jackson's discussion of the Privileges and Immunities Clause in *Edwards* v. *California* is instructive:

> This clause was adopted to make United States citizenship the dominant and paramount allegiance among us. The return which the law had long associated with allegiance was protection. The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: "Take heed what thou doest; for this man is a Roman."

314 U.S. 160, 182 (1941) (*dissenting opinion*).

The Fourth Amendment too has long been considered a "shield against oppression," and it should be included within the rights, privileges and immunities of citizens who are within the Commonwealth of Puerto Rico.

III.

Public Law 22 and the search made pursuant to that law violate the Fourth Amendment to the United States Constitution.

When he stopped Terry Torres, Officer Marcano did not have a search warrant.[24] He did not have probable cause either to arrest or to search Terry Torres.[25] And he had no reasonable ground to believe that Terry Torres had committed a crime or was carrying contraband.[26] He had, at most, a "hunch." *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968). Put simply, Terry Torres' liberty was in the hands of a "petty officer"[27] on August 6th, 1976. More importantly, it was not just that Puerto Rico placed the liberty of Terry Torres in the hands of officer Marcano, but, rather, that it placed the privacy, the dignity and the liberty of 1,642,052 persons in the hands of any officer of the Puerto Rican Police who chose to invade that privacy, violate that dignity and strip them of that liberty.[28]

This Court has seen more offensive individual violations of Fourth Amendment rights, but we doubt that it has considered a statute so sweeping in its scope and so lack-

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[24] Opinion of Mr. Justice Diaz Cruz. Juris. St., App. A at 31.

[25] Superior Court of Puerto Rico, San Juan Part, Resolution and Order. Juris. St., App. C at 108-09.

[26] Opinion of Mr. Justice Irizarry for the majority [hereinafter "Majority Opinion"]. Juris. St., App. A at 3.

[27] *See* James Otis' argument against the writs of assistance, reported in Adams, *Legal Papers of John Adams* 107 (1965).

[28] In the year 1976-77, 1,642,052 persons arrived at the San Juan Airport from the United States mainland. Commonwealth of Puerto Rico Tourism Company, *The Tourism Industry of Puerto Rico, Selected Statistics* 3 (1977).

ing in control over those who would implement it. It is only through the chance application of an unusual local procedural rule that the statute even survives to reach this Court.

The government concedes that there is no "international border" between Puerto Rico and the United States mainland. It claims, however, that there is an "intermediate" border between the mainland and Puerto Rico,[30] and that, if this Court will free Puerto Rico from "the conceptual prison of *stare decisis*,"[30] it can and should be authorized to conduct indiscriminate,[31] warrantless searches at that "border." The problem with the border search argument is threefold. First, there is no border, nor does Puerto Rico have the authority unilaterally to declare one. Second, even if there were such a border, the searches authorized by Public Law 22 are so subject to the whim of the officer that they cannot be justified even under an "intermediate border search" exception to the warrant requirement. Third, to the extent the government makes the additional claim that special crime problems justify a "border" search, the argument is wrong on the law and without foundation in the facts.

A. Public Law 22 Bears a Chilling Resemblance to the General Warrants and Writs of Assistance Which Gave Rise to the Fourth Amendment.

Public Law 22 bears a remarkable resemblance to the general warrants in England and the "hated writs of assistance" in its colonies. *Stanford* v. *Texas*, 379 U.S. 476,

[30] Motion to Dismiss or Affirm at 24.

[30] Opinion of Mr. Justice Diaz Cruz, quoted in Motion to Dismiss or Affirm at 38.

[31] Majority Opinion, Juris. St., App. A at 22.

481 (1965); *see*, *Marcus* v. *Search Warrant*, 367 U.S. 717, 729 n.22 (1961). The general warrants and the colonial writs of assistance were characterized by an indefinite authorization to search and seize:

> In Tudor England officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent. . . .

Stanford v. *Texas*, 379 U.S. 476, 482 (1965).

The writs of assistance in the colonies were "permanent search warrants placed in the hands of customs officials; they might be used with unlimited discretion and were valid for the duration of the life of the sovereign." J. Landynski, *Search and Seizure and the Supreme Court* 19 (Johns Hopkins University Studies in Historical and Political Science, ser. 84, No. 1, 1966) (hereinafter "Landynski"). The vice of the warrants and writs, their "truly offensive character,"[32] stemmed from two related and intolerable defects.

First, they were indiscriminate. They licensed the officer to seize Everyman, without particularized cause. *See*, *Wilkes* v. *Wood*, 19 Howell St. Tr. 1152, 1167 (1763). Just as Wilkes decried Lord Halifax' warrant for the authors and publishers of No. 45 of the North Briton as "a ridiculous warrant against the whole English nation," 2 T. May, *The Constitutional History of England* 245-52 (3d ed. 1889), Public Law 22 is a general warrant against the some 1,600,000 persons who arrive at the airport in San Juan from the mainland each year.

The second and closely related vice of the warrants was that they placed an impermissible degree of discretion in

[32] *Berger* v. *New York*, 388 U.S. 41, 58 (1967).

the hands of the officer. History has bitterly condemned that "discretionary power . . . to search wherever their suspicions may chance to fall." *Wilkes* v. *Wood*, 19 Howell St. Tr. 1153, 1167 (1763) (Chief Justice Pratt—later Lord Camden—summing up to the jury). In Otis' famous phrase it was intolerable to allow "a power that places the liberty of every man in the hands of every petty officer." (Otis' argument against the writs of assistance as reported in Adams, *Legal Papers of John Adams* 107 (1965)). The cure for this unfettered discretion was the neutral magistrate. In Lord Mansfield's words:

> It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer.

Lord Mansfield's summation in *Leach* v. *Three of the King's Messengers*, 19 Howell St. Tr. 1001, 1027 (1765), *quoted in United States* v. *United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 316 (1972).

The effort to remove discretion from the officer in the field led to the requirement that officers secure warrants and that these warrants describe the things to be seized with *particularity*.

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is taken, nothing is left to the discretion of the officer executing the warrant.

Marron v. *United States*, 275 U.S. 192, 196 (1927). *Accord*: *Berger* v. *New York*, 388 U.S. 41, 58 (1967); *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965).

The Fourth Amendment dealt with the twin problems of indiscriminate and discretionary searches by requiring specific warrants, issued upon probable cause, and particularly describing the person or things to be seized. The requirement is the same whether it is Agent Marcano seeking marihuana or the President of the United States dealing with "subtle and complex" matters of internal security. *United States* v. *United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 320 (1972).

The prohibition on warrantless searches is subject to but a few "jealously and carefully drawn" exceptions. *Jones* v. *United States*, 357 U.S. 493, 499 (1958). Those exceptions fall into three general categories: certain searches conducted where speed is essential and obtaining a warrant is impracticable, consent searches, and a very limited class of routine searches, which includes the border search. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 358-60 (1974). *Cf.*, *Carroll* v. *United States*, 267 U.S. 132, 153 (1925) (exigent circumstances); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) (consent); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (routine search). Unless they fall into one of these categories, warrantless searches, not incident to a lawful arrest, are *per se* unreasonable, in violation of the Fourth Amendment. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55 (1971).

Indeed, a search *with* probable cause *and* incident to a lawful arrest is still unreasonable if there was time to secure a warrant and none was obtained. In a case strikingly similar to this one, this Court recently held unreasonable the search of a locker shipped from San Diego to Boston even though there was probable cause to arrest,

there was probable cause to search, and a valid arrest had been made:

> [W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to an arrest either if the 'search is remote in time or place from the arrest,' . . . or no exigency exists.

United States v. *Chadwick*, 433 U.S. 1, 15 (1977).

Here, of course, there was no probable cause to arrest, no probable cause to search, and no search warrant. No one has suggested that the police had no time in this case to obtain a search warrant, nor has anyone argued that appellant voluntarily consented to a search. It is a routine search rationale which the government seeks to invoke. Motion to Dismiss or Affirm at 19, 21, 31.

The class of "routine" searches permitted without a warrant, however, is extremely limited. This Court has allowed searches of persons and objects entering the United States across an international border, *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973); searches of certain premises licensed for the sale of firearms and liquor, *United States* v. *Biswell*, 406 U.S. 311 (1972); and inventory searches of vehicles properly taken into police custody. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976).[19] Even in this narrow range, however, the search must still be reasonable in light of the purposes to be served and the method of execution.

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[19] In addition, some States allow limited agricultural inspections of vehicles as they cross the State border. These inspections, however, are dependent, at the very least, on some sort of suspicion that a vehicle contains prohibited plants or pests, and are limited in scope. *See, e.g.*, Hawaii Rev. Stat. Title 11 § 150A-5 (Supp. 1977); Arizona Rev. Stat., Title 3 § 3-113 (West 1974).

It is with these principles in mind that the government's "border search" rationale must be examined. As we demonstrate below, theirs is no border search. It is, to return to first principles, a "ridiculous warrant against the whole [Puerto Rican people]." 2 T. May, *The Constitutional History of England*, 243-52 (3d ed. 1889).

B. There Is No Border Between the United States Mainland and the Commonwealth of Puerto Rico.

The United States border—for purposes of custom searches—is defined by 19 U.S.C. § 1202(2), with specificity:

> The term "customs territory of the United States" . . . includes only the States, the District of Columbia, and Puerto Rico.

For purposes of immigration and naturalization as well, Puerto Rico is within the geographical definition of the United States. 84 Stat. 116; 8 U.S.C. § 1101(a)(38).

The customs territory of the United States has always been defined by the United States Congress. Nowhere in the enabling legislation, in the Constitution of Puerto Rico or in the legislative history of the Compact is there anything which suggests that the United States intended to cede the power to establish customs borders to the Commonwealth. On the contrary, the legislative history demonstrates that the grant of power to Puerto Rico is limited to matters of internal self-government. The remarks of Senator Joseph C. O'Mahoney at the hearings approving the Puerto Rican Constitution, held before the Committee on Interior and Insular Affairs of the United States Senate on April 29, 1952, are typical. In response to a question as to what power the United States was ceding to Puerto Rico, Chairman O'Mahoney replied:

> We are giving them the right to govern themselves with respect to matters that are strictly within the domain and the scope of local self-government. It is like the provisions that we talk about giving the people of the District of Columbia the right to handle their own affairs instead of having the Congress of the United States attempt to act as a city council for the District of Columbia.

U.S. Senate, Committee on Interior and Insular Affairs, Hearings Approving Puerto Rican Constitution, April 29, 1952, at 45.

The Senate Report Approving the Puerto Rican Constitution summarized the position of Puerto Rico within the federal system:

> The Commonwealth of Puerto Rico is not a State of the United States. Neither is it an independent republic. It is a self-governing community bound by the common loyalties and obligations of American citizens living under the American flag and the American Constitution and enjoying a republican form of government of their own choosing.

Senate Report No. 1720, June 10, 1952, at 7.

Puerto Rico is incontestably a part of the United States. Its residents are citizens of the United States. 66 Stat. 236; 8 U.S.C. § 1402. Until recently male residents were liable for compulsory service in the United States armed forces. 81 Stat. 100; 50 App. U.S.C. § 454(a). Likewise, Puerto Ricans look to the United States for the defense of the island. 47 Stat. 158; 48 U.S.C. § 733. Interchange of merchandise between Puerto Rico and the mainland is duty-

free. 47 Stat. 158; 48 U.S.C. § 738. If Congress had intended to create a border between the United States and Puerto Rico, it would have made some appropriate provision for one. It has not.

Moreover, the majority of the Puerto Rico Supreme Court below has firmly rejected the argument that the Compact empowered Puerto Rico to create a *de facto* border:

> The special relationship between Puerto Rico and the United States, based on the existence of a compact—Public Law 600, 81st Cong., 1 L.P.R.A., Vol. 1, pp. 136-138—does not empower us to consider the United States as a foreign country and to subject all persons arriving at Puerto Rico from the United States to an indiscriminate search of their persons and their belongings, without a search warrant and without probable cause or reasonable grounds. The Commonwealth is not an associated republic. Far from that, it is a political condition adopted by us in Puerto Rico based on, among other fundamental principles, our union with the United States. . . .
>
> (Juris. St., App. A at 19-20.)

No one questions that there are substantial differences between the government of Puerto Rico, the separate States and other territories of the United States. Puerto Rico's taxing structure is different. 69 Stat. 427, 48 U.S.C. § 734; 68A Stat. 293; United States Internal Revenue Code 933. There are a few special provisions relating to Puerto Rican economic interests and external commercial relations. 47 Stat. 158, 48 U.S.C. §§ 739, 740; 50 Stat. 843, 48 U.S.C. § 741; 49 Stat. 665, 19 U.S.C. § 1319a. These differences, however, do not confer upon Puerto Rico the power which its government claims for it here. The fact is that Puerto

Rico may no more create a border than it may raise a standing army."

C. The Challenged Searches Are Neither Made at the Functional Equivalent of a Border Nor Otherwise Exempt from Warrant and Probable Cause Requirements.

The government seeks to justify this search as one which occurred at an "intermediate border." That characterization, however, cannot insulate the search from the warrant and probable cause requirements of the Fourth Amendment.

The claimed "intermediate border" offered by the government is, of course, not the "functional equivalent" of a true border. Such "functional equivalents" are extensions of the international border, where neither probable cause nor a warrant is required. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 272 (1973). Thus, St. Louis airport is the functional equivalent of a border for a non-stop flight from Mexico City. Similarly, a station "at a point marking the confluence of two or more roads that extend from the border" may be the border's functional equivalent. 413 U.S. at 273. Federal officers may conduct routine searches there because it is impossible or highly impracticable for them to do so at the true border. The St. Louis police, however, have no power to conduct their own searches at that functional equivalent. It is not they who are entrusted with the authority to conduct federal customs searches. *See, Hampton* v. *Mow Sun Wong,* 426 U.S. 88 (1976).

It is true that this Court has permitted warrantless *stops* by federal officers at points removed from the border

[34] *See, Almeida-Sanchez* v. *United States,* 413 U.S. 266, 272 (1973), predicating the right to conduct border searches on "Federal" authority at "international" borders.

or its functional equivalent. *United States* v. *Martinez-Fuerte,* 428 U.S. 543 (1976). The government's reliance on that rationale is, however, misplaced. First, the stops there were conducted by officers who would have had full authority to search at the true border. Second, the stops are just that: stops. In *Martinez-Fuerte* the Court permitted stops without "reasonable suspicion" for routine questioning, but it reiterated its holding in *United States* v. *Ortiz,* 422 U.S. 891 (1975) that "checkpoint searches are constitutional only if justified by consent or probable cause to search." 428 U.S. at 567. Even the stops permitted by *Martinez-Fuerte* were allowed only because they were at "fixed checkpoints" and because the "reasonable suspicion" standard was "impractical because the flow of traffic tends to be too heavy to allow . . . particularized study of a given car. . . ." 428 U.S. at 557. At other than fixed checkpoints, the requirement of "reasonable suspicion" before a stop remains. *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 883 (1975).

In no event has this Court countenanced full searches at checkpoints of any sort on anything less than probable cause. *United States* v. *Ortiz,* 422 U.S. 891, 897 (1975); *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 273 (1973). Here, the police did not even have reasonable suspicion, yet they conducted a full search.

If Puerto Rico may conduct searches of incoming mainland passengers, surely New York City can conduct searches at its airports, docks, highways and bridges. Its officers, too, may rummage at will through the luggage of our citizens. If Agent Marcano may single out Terry Torres, open his suitcase and discover an ounce of marihuana, officer Jones may single out any person, open his or her luggage and discover the most intimate of personal articles. The intrusion is real, humiliating and totally unjustified.

The search below, by any name the government chooses to call it, is constitutionally intolerable.

D. The Asserted Needs of Law Enforcement Cannot Justify Puerto Rico's Departure From the Principles of the Fourth Amendment.

The "Statement of Motives" which introduces Public Law 22 begins as follows:

> Puerto Rico is at present entangled in a vigorous campaign directed to prevent the buying and selling, transfer and use of narcotic drugs, firearms, and explosives.
>
> Laws of Puerto Rico (West, 1975) at 658-59; App. at 4a.

The Statement goes on to relate that "it is widely known" that some incoming passengers and crew from the mainland bring with them such controlled substances and that the federal government does not require these passengers and crew to go through customs inspections upon their arrival. This failure to inspect, the Statement concludes, "has contributed greatly to an increase in the smuggling of" contraband, with a resulting "rise in criminality and greater insecurity among the citizenship." *Id.*

The prevailing minority of the Puerto Rican Supreme Court emphasized the gravity of the harm which Public Law 22 seeks to prevent. That harm, the minority argues, when combined with the island's inherent susceptibility to illegal traffic in guns and narcotics, justifies the use of Public Law 22 to protect the populace. Thus, Justice Diaz emphasized that Puerto Rico is completely surrounded by international waters. The result, he stated, is:

> . . . a severance of the geographic continuity which merges 48 of the states of the Union into a single territorial body whose safety and order is protected by Congressional and state legislation. Hence, those states are not as vulnerable as Puerto Rico to the entry into their territories of smugglers and traffickers of illegal merchandise.
>
> Juris. St., App. A at 45.

Similarly, at the trial court level, Judge Figueroa relied on the "peculiar condition of the island" to justify Public Law 22:

> because of the peculiar condition of our island, the unrestricted ease with which American citizens travel from any point in the United States to Puerto Rico, and vice versa, the frequency with which domestic flights arrive at and depart from our airport, and also because the inspection carried out under [Public Law 22] is not covered by the federal government.
>
> Juris. St., App. C at 115.

These arguments will not hold. Puerto Rico's "peculiar condition" is shared by Hawaii which is even further removed geographically from the mainland. It is also shared with the Island of Manhattan. Certainly, people travel with "unrestricted ease" from any point in the United States to Manhattan Island and vice versa. "[D]omestic flights arrive at and depart" from New York with at least as much frequency as they arrive and depart from San Juan. And as in Puerto Rico the federal government does not carry out inspections between New Jersey and New York. Yet it is inconceivable that New York would be allowed to institute anything resembling Public Law 22.

The fact is that its geographical isolation may afford even greater protection to Puerto Rico than to the states of the mainland. Unlike most states, entry into Puerto Rico is made primarily through one point—the San Juan airport. Using normal police procedures, including probable cause to arrest, the San Juan police may focus on a single point of entry rather than being forced to patrol an entire state boundary for illegal drug traffic.

Due to modern conditions of travel and communication, Puerto Rico is simply not as peculiar as its government would have us believe. Mr. Justice Irizarry writing for the majority, pinpointed the fallacy:

> . . . We are an island with regard to travel by sea. When traveling by plane there is no difference between going from here to Miami or from Miama [sic] to New York.
>
> Juris. St., App. A at 21.

The analogy between Puerto Rico and New York City is especially apt. Manhattan is, of course, an island. Unlike Puerto Rico, however, it has many points of entry and egress by bridge and by tunnel, a fact which increases the difficulty of controlling illegal traffic from other states. The extent of New York City's crime problem is both well-known and well-documented. *See, e.g.,* Gottfredson, *et al., Sourcebook of Criminal Justice Statistics* 354-66 (1977). In 1975, the personal robbery rate in New York City was 2,386 for every 100,000 residents. Gottfredson, *supra,* at 354. By contrast, the personal robbery rate in Puerto Rico for 1975 was 150 per 100,000 inhabitants.[35] Puerto Rico

[35] Puerto Rican statistics differentiate between street robberies and residential robberies. In 1975, street robberies occurred at a rate of 115 per 100,000 inhabitants. Residential robberies occurred at a rate of approximately 35 per 100,000 residences. *Puerto Rico Crime Comm'n, supra,* at 26.

Crime Commission, *Comprehensive Criminal Justice Plan* 26 (1977). While comparable statistics for New York City and San Juan are not available for 1976, the rate for violent crime for New York State as a whole was 868.1 per 100,000 inhabitants as compared to 514.8 per 100,000 in Puerto Rico.[36]

The State of New York has instituted severe penalties, including mandatory maximum life terms, for certain narcotics offenses. *See, e.g.,* N.Y. Penal Law § 220.43 (McKinney 1975); N.Y. Penal Law § 70.00 (McKinney Supp. 1977). Yet, despite the severity of its crime problem, New York has never attempted to suspend the basic protections of the Fourth Amendment as Puerto Rico has done with Public Law 22.

The prevalence of illegal narcotics is a nationwide problem which is not unique to Puerto Rico. For example, in an attempt to control illegal traffic in drugs, the federal Drug Enforcement Agency ("DEA") instituted special surveillance of airline flights to and from cities which it had identified as nationwide drug distribution centers. *United States* v. *Craemer,* 555 F.2d 594, 595 (6th Cir. 1977). The prime component of the program is a "drug courier profile" which sets forth certain characteristics common to travelers carrying illegal drugs. While the precise characteristics remain secret, they include the following:

> . . . (1) the use of small denomination currency for ticket purchases; (2) travel to and from major drug import centers, especially for short periods of time; (3) the absence of luggage or use of empty suitcases on

[36] Federal Bureau of Investigation, *Crime in the United States—1976 Uniform Crime Reports* 50, 53 (1977). The FBI defines "violent crime" as murder, forcible rape, robbery and aggravated assault.

trips which normally require extra clothing; and (4) travel under an alias.

United States v. *Van Lewis*, 409 F.Supp. 535, 538 (E.D. Mich. 1976).

In overturning convictions obtained through use of the DEA drug profile, the Sixth Circuit has stated emphatically that, taken alone, the drug courier profile will not justify even the limited search allowed pursuant to an investigative stop in *Terry* v. *Ohio*, 392 U.S. 1 (1968). *United States* v. *Craemer*, 555 F.2d 594, 597 (6th Cir. 1977); *United States* v. *McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977). It most certainly does not give rise to probable cause to make an arrest, thereby justifying a full-scale search of both the individual and his luggage. *United States* v. *Lewis*, 556 F.2d 385, 389 (6th Cir. 1977). The Sixth Circuit reasoned that, even assuming that an adequate profile could be drawn, it is still "too amorphous to be integrated into a legal standard." Thus, federal drug enforcement officials are held to the standards of the Fourth Amendment. Travelers subject to the jurisdiction of the San Juan Police are entitled to no less.

Assertions of the needs of law enforcement have been consistently rejected as justification for abandoning Fourth Amendment principles. As Mr. Justice Jackson said for the Court in *United States* v. *Di Re*, 332 U.S. 581, 595 (1948):

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to

> place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.

This Court has recently reaffirmed that fundamental precept of Fourth Amendment law:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension wth the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.
>
> *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273 (1973).

See, also, United States v. *Ortiz*, 422 U.S. 891, 892 (1975); *Mincey* v. *Arizona*, —— U.S. ——, 57 L. Ed.2d 290 (1978).

Nor may this search be justified by analogizing it to preboarding airport weapons searches. This Court has not yet passed on the constitutionality of airport weapons searches. But even if they are upheld, routine weapons searches differ drastically from those conducted under Public Law 22. First, arguably they are justified by the immediate danger of harm to those boarding the plane. Traffic in guns and narcotics has a far less direct effect on its victim with many more intermediate opportunities for police intervention. Second, routine weapons searches are conducted *before* boarding an airplane, not after exiting as was the case here. Third, because they rely on mechanical detection

devices, weapons searches are generally far less intrusive and more limited in scope than the search of appellant at issue here. Fourth, the weapons search is at least impliedly consensual. Notice is given and an individual may forego boarding the airplane rather than submit to the search. *See, United States* v. *Moore*, 483 F.2d 1361 (9th Cir. 1973) (disapproving search conducted after individual had abandoned attempt to board airplane). No such opportunity was afforded appellant. Finally, and most importantly, everyone must undergo search. The blanket nature of the search makes it far more reminiscent of the stop required at a toll booth than the arbitrary and personalized detention to which appellant was subjected.

The search at issue here fails to qualify as an airport weapons search either in fact or by analogy. The differences are simply too great to bring it within the permissible scope of an administrative search.

Puerto Rico has sought to differentiate itself from the mainland as a means of justifying procedures which violate the Fourth Amendment. As demonstrated above, Puerto Rico's island status in no way renders it less able to control illegal traffic than certain other regions of the United States. The stop and search procedures which Puerto Rico has adopted represent serious and unwarranted invasions of both Fourth Amendment protections and the constitutional right to travel. As such, they cannot be allowed to continue.

IV.

Public Law 22 violates the right to travel by imposing an impermissible burden on a class of persons who have recently exercised that right.

Even if Public Law 22 is not invalid under the Fourth Amendment, it impermissibly burdens the federal constitutional right to travel enjoyed by all citizens of the United States.

The right to travel, although nowhere specifically mentioned in the Constitution, "has been firmly established and repeatedly recognized." *United States* v. *Guest*, 383 U.S. 745, 757 (1966). The right is grounded in the Privileges and Immunities Clause (Article IV, Section 2) and in the Fifth and Fourteenth Amendments." *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908); *Kent* v. *Dulles*, 357 U.S. 116, 125-126 (1958); *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969). Since these provisions apply to Puerto Rico, the right to travel does as well. *See, Examining Board* v. *Flores de Otero*, 426 U.S. 572, 600 (1976) and 61 Stat. 772, 48 U.S.C. § 737.

This Court has recently stated that the right to travel freely among any of the several states is "virtually unqualified." *Califano* v. *Torres*, —— U.S. ——, 55 L.Ed.2d 65, 69 n. 6 (1978). The Court there "assumed" that the right applies with the same force to Puerto Rico. *Id.*

Public Law 22 penalizes a distinct class of persons who have recently exercised their right to travel from the

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[37] It is therefore not dependent upon a finding by this Court that the Fourth Amendment applies to Puerto Rico.

United States mainland to Puerto Rico. Pursuant to this law, members of the class are subjected to indiscriminate detention, questioning and search of their belongings at the uncontrolled discretion of Puerto Rican officials. Such searches constitute a significant invasion of personal privacy, regardless of whether the Fourth Amendment itself applies to the island. The interest invaded as a result of exercising the right to travel need not be fundamental or even constitutional in order for the right to be infringed. *Shapiro* v. *Thompson*, 394 U.S. 618, 611, n. 6 (1969); *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974).

Nor is it incumbent upon appellant to demonstrate that Public Law 22 actually deters persons from exercising their right to travel to Puerto Rico. This Court, in *Dunn* v. *Blumstein*, 405 U.S. 330, 340 (1972), rejected a similar contention:

> In *Shapiro*, we explicitly stated that the compelling state interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel] . . ." *Id.* at 634. (Emphasis added.)

Thus, the imposition of *any* penalty on the constitutional right to travel must be justified by a compelling state interest. American travelers to Puerto Rico are clearly penalized by Public Law 22, whether it contravenes their right to be free from unreasonable searches and seizures under the Fourth Amendment or whether it is seen as a significant impingement on the human privacy and individual dignity to which our society historically has been committed.[20]

[20] We are not dealing here with a situation analogous to the one presented in *Sosna* v. *Iowa*, 419 U.S. 393 (1975), where a durational residency requirement was upheld in part because the appellant had not been "irretrievably foreclosed", through the exercise of her right to travel, from access to a state-provided benefit. 419 U.S. 393, 406. Once a person's privacy has been violated, it cannot be restored. Public Law 22 "irretrievably forecloses" American travelers from the respect for their personal privacy which the Puerto Rican government is bound to maintain.

A statute such as Public Law 22 is valid only if it is necessary to protect a compelling and substantial governmental purpose which cannot be pursued by a means less restrictive of the fundamental right to travel. *Dunn* v. *Blumstein*, 405 U.S. 330, 340; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 514 (1964).

The government describes the interest on which it relies as a justification for Public Law 22 as "a serious public safety problem caused by the illegal introduction of firearms, explosives and narcotic drugs throughout airports and docks . . . ." Motion to Dismiss or Affirm at 27, 28. Puerto Rico, however, is not alone. Every state in the Union, as well as the federal Government, faces a similar problem. No other government officials have been granted the sort of investigatory license which the San Juan Police employ under Public Law 22. Nor should they be. Rather law enforcement officials throughout the nation are rightfully required to use the same, less intrusive investigative techniques in dealing with lifelong residents of the area as with travelers passing through.

Public Law 22 imposes a disabling and impermissible diminution on the right to travel to Puerto Rico.

V.

The application below of Article V, Section 4 of the Constitution of Puerto Rico violated the Due Process and Supremacy Clauses of the United States Constitution.

If Agent Marcano had conducted the search with no statutory authority at all, appellant's conviction would long since have been reversed. It would have been reversed because a majority of the sitting members of the Supreme Court of Puerto Rico recognized the patent unconstitutionality of the search. However, the combination of the passage of Public Law 22 and the restraints imposed upon that court by its own Constitution rendered the court incapable of vindicating appellant's fundamental federal rights. When a majority of the court hearing a case is unable to uphold an appellant's constitutional rights, the result violates both the Due Process and the Supremacy Clauses of the United States Constitution.

The bizarre outcome below was the result of Article V, § 4 of the Constitution of the Commonwealth of Puerto Rico. That section provides:

> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices *of which the Court is composed* in accordance with this Constitution or with law. [Emphasis added.]

The Supreme Court of Puerto Rico is currently composed of eight Justices.[39] For reasons not appearing in the rec-

[39] Prior to 1975, the court was composed of a Chief Justice and eight Associate Justices. By Act No. 29, May 28, 1975, upon request of the Supreme Court, the Legislature of Puerto Rico reduced the number of Associate Justices to six. The Legislature recognized that a vacancy then existed on the court and provided that "[w]hile there is no vacancy in addition to the existing one, the Court shall continue sitting as at present constituted." 4 L.P.R.A. § 31 (Supp. 1977).

ord below, only seven members of the court heard and decided the appeal. Of those seven, four voted to reverse the conviction on the grounds that Public Law 22 was unconstitutional and that the trial court erred in admitting the evidence seized pursuant to the law. Opinion of Irizarry, J. (Juris. St., App. A at 1).

Although a majority of the Justices who heard the case believed Public Law 22 to be unconstitutional, the court nevertheless affirmed the judgment below on the basis of Article V, section 4 of the Constitution of the Commonwealth of Puerto Rico.

On its face, Article V, section 4 is not unconstitutional. Most courts, including this one, decide cases by majority vote.[40] However, in Puerto Rico when less than the full Court sits, a simple majority will not suffice to overturn a local law in the face of a constitutional challenge. Indeed, when the Court sits in divisions of three, as it is empowered to do by Article V, § 4, it is literally impossible for a federal constitutional attack on a local statute to prevail.[41] In *People* v. *Perez*, 83 P.R.R. 518

[40] Only 3 states require more than a simple majority in order to declare a law unconstitutional. Neb. Const. art. V, §2; N.D. Const. art. IV, § 9, Va. Const. art. VI, § 2. In addition, the Florida Constitution provides for a seven-member Supreme Court, of which four members must concur in *all* decisions. Fla. Const. art. 5, § 4(1).

[41] The version of Art. V, § 4 quoted by the Puerto Rican Supreme Court in its opinions below differs slightly from the original version, which appears at 48 U.S.C. § 731d:

> The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions. All the decisions

(1961), for example, the Supreme Court of Puerto Rico held that a defendant's appeal could be heard by a three-member division of the Supreme Court, even though the division was powerless to declare unconstitutional the statute under which defendant was convicted.

There is no doubt that Puerto Rico may restrict the scope of judicial review by its Supreme Court in cases arising under its own constitution. However, when federal constitutional rights are called into question, the effect of Article V, section 4 is to subordinate those rights to local law. Such a result violates both the Due Process and Supremacy Clauses of the United States Constitution.[42]

It is well settled that once a state grants a right of appeal to criminal defendants, federal due process requirements govern the appellate procedure. *Douglas* v. *California,* 372 U.S. 353, *reh. denied,* 373 U.S. 905 (1963); *Griffin* v. *Illinois,* 351 U.S. 12 (1956). *See, Ross* v. *Moffitt,* 417 U.S. 600 (1974).

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of the Supreme Court shall be concurred in by a majority of its members. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law.

[42] This Court has determined that federal principles of due process govern proceedings in the courts of Puerto Rico. However, the Court has not yet determined whether it is the Fifth or the Fourteenth Amendment which makes those principles applicable. *Examining Board* v. *Flores de Otero,* 426 U.S. 572, 600-01 (1976). Regardless of which due process provision applies, the Supremacy Clause prohibits any violation of federal due process rights by the Commonwealth of Puerto Rico. U.S. Const., art. VI. *See Examining Board* v. *Flores de Otero, supra,* 426 U.S. 572 at 602; U.S. Senate, Report No. 1720, *Approving the Constitution of the Commonwealth of Puerto Rico,* June 10, 1952, 7 (acts of the Puerto Rican Legislature in conflict with Federal Constitution would be null and void).

Puerto Rico provides for appeal from a criminal conviction. 4 L.P.R.A. § 37 (West Supp. 1977). Under the principles enunciated in *Reid* v. *Covert,* 354 U.S. 1 (1957) and *Examining Board* v. *Flores de Otero,* 426 U.S. 572, 600-01 (1976), federal due process requirements must govern Puerto Rican appellate procedures. Thus, in exercising his right of appeal directly to the Puerto Rican Supreme Court, appellant could not be denied a transcript of the trial court proceedings because of an inability to pay. *Griffin* v. *Illinois,* 351 U.S. 12 (1956). Nor could he be denied the right to counsel on appeal, *Douglas* v. *California,* 372 U.S. 353 (1963), nor be made to pay a filing fee. *Burns* v. *Ohio,* 360 U.S. 252 (1959). Yet if this application of Article V, Section 4 is allowed to stand the appellant will have been convicted pursuant to a law which a majority of the Justices sitting were convinced is unconstitutional. When a principled application of the Fourth Amendment is frustrated by the chance mathematics which favor local laws over federal constitutional rights, a criminal defendant has been denied due process of law, and his conviction should be reversed.[43]

This Court has not hesitated to set aside state procedural requirements that interfere with the assertion of federal rights. In *Chapman* v. *California,* 386 U.S. 18 (1967), the Court overturned a state harmless error rule that required the California Supreme Court to affirm a conviction even though the defendants' right to remain silent at trial had been violated.

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[43] The result in the Supreme Court of Puerto Rico is all the more anomalous given the provision for a seven-member court enacted by the Puerto Rican Legislature. See n. 39, *supra.* Thus, appellant not only won a majority of the court that heard his case, but he won the requisite number of votes which the Puerto Rican Legislature intends to be necessary in order to declare a law unconstitutional.

In reversing the convictions, the Court stated:

> With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.
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> 386 U.S. at 21.

See, Chambers v. *Mississippi,* 410 U.S. 284 (1973). *Cf., Love* v. *Griffith,* 266 U.S. 32 (1924) (local rule concerning mootness must give way to assertion of federal right).

Appellant does not challenge Article V, Section 4 on its face. Rather, he challenges the constitutionality of the provision as applied in his case because it clearly favors local law over the Federal Constitution. By forcing appellant to win more than a simple majority to his point of view, Article V, § 4, places an impermissible burden on the assertion of his federal constitutional rights.

Simple mathematics demonstrates the extent of the burden placed on appellant's federal constitutional rights. Five members of the Supreme Court of Puerto Rico would have had to agree in order to vindicate appellant's Fourth Amendment rights. Only three were necessary to extinguish those rights.

Puerto Rico is included among a distinctly small minority of jurisdictions which require more than a majority in

order to declare a law unconstitutional. Only three other States—Nebraska, North Dakota and Virginia—have similar requirements. See note 40, *supra.* Two of these specifically allow designation of a substitute Justice if a member of the court is absent. Neb. Const. Art. V, § 2; N.D. Const. Art. IV, § 88. The clear weight of authority and usage in the fifty States and throughout the federal courts mandates adherence to simple majority rule. *See, Duncan* v. *Louisiana,* 391 U.S. 145, 161-162 ("It is sufficient for our purposes to hold that a crime punishable by two years in prison is, *based on past and contemporary standards in this country,* a serious crime and not a petty offsense.") (Emphasis added.)

Ohio ex rel. Bryant v. *Akron Metropolitan Park District,* 281 U.S. 74 (1930), does not compel a different result. That case upheld a provision of the Ohio Constitution which prevented the Ohio Supreme Court from declaring a statute unconstitutional unless all but one of the judges agreed or unless the decision affirmed a similar judgment by a state court of appeals. The provision, long the subject of strenuous criticism by the Ohio judiciary, was repealed by popular referendum in 1968. *City of Euclid* v. *Heaton,* 238 N.E.2d 790, 15 O.S.2d 65, 44 O.O.2d 50 (1968).

Unlike the instant case, *Ohio ex rel. Bryant* involved a civil suit. The Court disposed of the due process issue in a single paragraph, emphasizing that plaintiffs had been afforded ample opportunity "to contest all constitutional and other questions fully in the common pleas court and again in the court of appeals . . . ." 281 U.S. at 80. Appellant was provided no such opportunity here.

In the nearly fifty years since *Ohio ex rel. Bryant* the concept of due process has changed so dramatically that

the principles on which the Court relied in that case are no longer applicable. In that period of time, for example, criminal defendants in state courts have been guaranteed the right to trial by jury, *Duncan* v. *Louisiana,* 391 U.S. 145 (1968); to be free of compelled self-incrimination, *Malloy* v. *Hogan,* 378 U.S. 1 (1964); to a speedy and public trial, *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967) and *In re Oliver,* 333 U.S. 257 (1948); to the protection of the exclusionary rule against evidence illegally obtained, *Mapp* v. *Ohio,* 367 U.S. 643 (1961); and to the assistance of counsel, *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

Ohio ex rel. Bryant, arising out of a civil setting, upheld a provision which the voters of Ohio have since rejected. It should not control here.

This Court recently denied certiorari in a case affirmed by an equally divided Supreme Court of Pennsylvania in which all participating judges concluded for various reasons that the judgment was erroneous. *Estate of Wilson* v. *Aiken Industries, Inc.,* —— U.S. ——, 47 U.S.L.W. 3219 (Oct. 2, 1978). Mr. Justice Blackmun concurred for procedural reasons in the denial of certiorari, but at the same time, he expressed "substantial discomfort" with the result. *Id.*

Aiken involved a civil suit with only money damages at stake. Appellant here faces a prison term of from one to three years. When a conviction is affirmed over the objection of a majority of the court which hears the case, more than "substantial discomfort" must arise. Appellant's federal constitutional rights have been subordinated to local law in violation of the Supremacy and Due Process Clauses of the United States Constitution.

CONCLUSION

Set aside the history, the delicate matters of intranational relations, the inevitable stridency on both sides of this issue, and one simple truth remains. Searches of our belongings by anyone are demeaning; they make us feel vulnerable, afraid, less free. Any search not justified by the most substantial of reasons moves us inexorably toward the truly dangerous point at which people do not feel demeaned when they search or are searched, when they accept the intrusion as commonplace.

We do not believe that free America will cease to be if these searches are allowed, anymore than we believe that crime in Puerto Rico will increase if they are rightly condemned. But all of us, searcher and searched alike, will be the less if they are allowed to continue.

Public Law 22 and the search pursuant to that law should be declared unconstitutional, and the case should be remanded to the Supreme Court of Puerto Rico for proceedings not inconsistent with that determination.

Respectfully submitted,

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APPENDIX

APPENDIX

Statutory and Constitutional Provisions Involved

Article IV of the United States Constitution

Section 2, Clause 1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Section 3, Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Article VI, Clause 2 of the United States Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, Section 10, of the Constitution of the Commonwealth of Puerto Rico (48 U.S.C. § 731d):

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

Wire-tapping is prohibited.

No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause

supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.

Evidence obtained in violation of this section shall be inadmissible in the courts.

Article V, Section 4, of the Constitution of the Commonwealth of Puerto Rico

The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three Justices. No law shall be held unconstitutional except by a majority of the total number of Justices of which the Court is composed in accordance with this Constitution or with law.

Article VI, Section 16 of the Constitution of the Commonwealth of Puerto Rico

All public officials and employees of the Commonwealth, its agencies, instrumentalities and political subdivisions, before entering upon their respective duties, shall take an oath to support the Constitution of the United States and the Constitution and laws of the Commonwealth of Puerto Rico.

Article VII, Section 3 of the Constitution of the Commonwealth of Puerto Rico

No amendment to this Constitution shall alter the republican form of government established by it or abolish its Bill of Rights. Any amendment or revision of this Constitution shall be consistent with the resolution enacted by the Congress of the United States approving this Constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal

Relations Act, and with Public Law 600, of the Eighty-first Congress, adopted in the nature of a compact.

TITLE 48 UNITED STATES CODE §731d (64 Stat. 319)

Upon adoption of the constitution by the people of Puerto Rico, the President of the United States is authorized to transmit such constitution to the Congress of the United States if he finds that such constitution conforms with the applicable provisions of sections 731b-731e of this title and of the Constitution of the United States.

Upon approval by the Congress the constitution shall become effective in accordance with its terms.

PUBLIC LAW 22: 7th SPECIAL SESSION—7th ASSEMBLY, COMMONWEALTH OF PUERTO RICO

Police—Inspection of Luggage, etc., of Passengers and Crew

[No. 22]

[Approved August 6, 1975]

AN ACT

To empower and authorize the Police of Puerto Rico to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question and search those persons whom the Police have ground to suspect that are illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

STATEMENT OF MOTIVES

Puerto Rico is at present entangled in a vigorous campaign directed to prevent the buying and selling, transfer and use of narcotic drugs, firearms, and explosives.

It is widely known that among passengers and crew who arrive in the Island from the United States, there are persons who illegally bring with them or in their luggage, bundles, bags, and packages, firearms, explosives, narcotic drugs and other substances controlled by law. The Federal Government does not require these passengers or crew to go through the Customhouse after arrival in the Island for inspection of their luggage or person. This has contributed greatly to an increase in the smuggling of firearms, explosives, and narcotic drugs by this means, with its concomitant results which are manifested by a rise in criminality and greater insecurity among the citizenship.

The inspection of luggage, cargo and persons to reduce the introduction of firearms, explosives, and narcotic drugs illegally brought from the United States to Puerto Rico is a legitimate area of control on the part of our government in exercising its police power, especially when the same is not covered by the Federal Government, and there is no conflict of authority on this matter between both governments.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—

The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain,

question, and search those persons whom the Police have ground to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances.

Section 2.—

Advertisement of the provisions of this act shall be placed in a visible place on piers and airports by the Police of Puerto Rico for all landing passengers.

Section 3.—

Personnel assigned to implement this act shall wear a uniform as determined by the Police Superintendent, and shall be provided with credentials to be shown to the persons concerned before searching them. The search shall be in a respectful way, and as brief as possible.

Manual search of persons shall be carried out by individuals of the same sex as the person involved, and in appropriate places guaranteeing the greatest privacy.

Section 4.—

The Police Superintendent may request the cooperation and collaboration of any Commonwealth or Federal Agency or department whenever necessary and pertinent for the purposes of this act.

Section 5.—

Funds for the enforcement of this measure shall be appropriated in the General Budget of the Police of Puerto Rico.

—Laws of Puerto Rico, 1975,
West, pp. 658-659